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Supreme Court, U.S.
FILED
MAR 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

No.

In The

Supreme Court of the United States

October Term, 1986

STATE LINE DELIVERY SERVICE, INC.,

Petitioner,

vs.

JUAN F. RIVERA and LILLIAN ROBERTS,
as Commissioner of the New York State
Department of Labor,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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On the Writ:

James C. McMahon, Jr.
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Virgil Mountain, Inc. (212) 243-3332 (L602)

QUESTIONS PRESENTED

1. Is a decision by the New York State Court of Appeals which completely ignores and is in conflict with its own previous holdings, without discussion, explanation, or hearing in that forum, sufficient to deprive Petitioner of its reasonable expectations of certainty in application of the laws respecting the status of independent contractors and unemployment insurance liability?

2. Is a decision by the New York State Court of Appeals which completely disregards prior law, upon which Petitioner relied in establishing its transportation business, violative of the due process clause of the Constitution, where said decision does not purport to change existing law, but, in effect, destroys the entire economics of motor carrier regulation in New York State?

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No.

In The

Supreme Court of the United States

October Term, 1986

STATE LINE DELIVERY SERVICE, INC.,

Petitioner,

vs.

JUAN F. RIVERA and LILIAN ROBERTS, as Commissioner of the New York State Department of Labor,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner, State Line Delivery Service, Inc. ("State Line") respectfully prays that a writ of certiorari issue to review the memorandum decision of the New York Court of Appeals, made and entered December 18, 1986, which reversed the Order of the New York Supreme Court, Appellate Division Third Judicial Department, which Order had held that Respondent, Juan F. Rivera, was an independent contractor and not an employee of Petitioner, State Line.

OPINIONS BELOW

The opinion of the New York Court of Appeals is not reported. A copy is annexed as Appendix E. The opinion of the New York Supreme Court, Appellate Division Third Judicial Department, is reported at 120 A.D.2d 852, 501 N.Y.S.2d 964 (3d Dep't, 1986). A copy is annexed as Appendix C. A copy of the opinion of the New York State Unemployment Insurance Appeal Board is annexed as Appendix B. A copy of the decision of the Administrative Law Judge of the New York State Unemployment Insurance Appeal Board is annexed as Appendix A.

JURISDICTION

This petition is filed pursuant to 28 U.S.C. §1257(3) and 28 U.S.C. §2101(c), within the time allowed by law.

CONSTITUTIONAL PROVISIONS

The principal constitutional provision involved is Section 1 of the Fourteenth Amendment of the United States Constitution. A copy is annexed as Appendix I.

STATEMENT OF THE CASE

The decision of the New York Court of Appeals as to which review is now sought makes it impossible for the motor carrier industry in the State of New York to function with any degree of certainty with the use of independent contractors—who are an integral part of the transaction of such business. Because the business operations of Petitioner were specifically designed in reliance on the

laws of the State, and because the Court of Appeals has acted in complete disregard of its own interpretation of those laws, Petitioner and other motor common carriers similarly situated are now unable to transact business in a manner originally calculated to comply with such laws.

State Line has been in the messenger service business for approximately seven (7) years. It picks up and delivers envelopes and small packages between points in Westchester County and points in the City of New York. State Line is certified to engage in the messenger service business by the New York State Department of Transportation.

State Line utilizes "owner-operators"—independent delivery persons—who own and operate their own equipment to make deliveries. State Line may utilize as many as fourteen (14) owner-operators in its service, however, this number varies daily. The claimant, Juan F. Rivera, was one of these "owner-operators."

In October, 1983, Rivera voluntarily chose to discontinue his association with State Line in order to return to school, and filed a claim for unemployment insurance benefits effective December 12, 1983.

Initially, the Commissioner of Labor determined the claimant eligible for unemployment insurance. State Line objected to this determination because the claimant was not an employee, but an independent contractor.

A hearing was held on August 27, 1984 before Administrative Law Judge John E. Reilly and continued thereafter on October 4, 1984. In a decision filed on January 24, 1985, the Administrative Law Judge determined that the claimant and all others similarly situated were, in fact, independent contractors and not employees of

State Line. (Appendix A).

The Commissioner of Labor appealed the decision of the Administrative Law Judge to the Unemployment Insurance Appeal Board, which, in a decision filed on August 21, 1985 reversing the Administrative Law Judge, determined that State Line owner-operators were "part-time" delivery persons, and that State Line exercised such supervision, direction and control, so as to establish an employer-employee relationship under the Unemployment Insurance Law. (Appendix B).

THE APPELLATE DIVISION DECISION

The Appellate Division, Third Department, reversed the Appeal Board. It held that there was *not* substantial evidence of record to support the finding that the delivery drivers were State Line employees. Accordingly, this Court sustained the finding of the Administrative Law Judge that State Line's owner-operators were "independent contractors."

THE NEW YORK COURT OF APPEALS DECISION

In a memorandum decision, the New York Court of Appeals, reversed the Appellate Division on the basis of the "substantial evidence test" alone. The Court found that, despite the record as a whole, *some* evidence did exist to support a finding of employee status. This decision was rendered by the Court of Appeals without the usual briefing and oral argument which accompanies the determination of an issue as significant as the one at bar.

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that the New York Court of Appeals, in reaching its decision, failed to consider serious federal equal protection and due process violations, both procedural and substantive in nature, committed by the Unemployment Insurance Appeal Board.

In *Brinkerhoff-Faris Trust & Savings Company v. Hill*, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930), this Court clearly stated the position that the federal guaranty of due process extends to state action through its judicial, as well as through its legislative, executive, or administrative, branch of government. Said the Court, at 281 U.S. 679-680:

> "If the [due process violation] were attained by an exercise of the state's legislative power, the transgression of the due process clause of the 14th Amendment would be obvious ... The violation is none the less clear when that result is accomplished by the state judiciary in the course of constructing an otherwise valid ... state statute." [citations omitted]

Where a state court fails to pass on evidence or make findings of fact bearing on a question of federal law because, under their respective views, the facts referred to are immaterial, the Supreme Court of the United States is not relieved from the duty of examining the evidence for the purpose of determining what facts reasonably might be and presumably would be found therefrom by the state court. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 at 703, 65 S.Ct. 895, 89 L.Ed. 1296 (1945), *reh. den.*, 325 U.S. 893, 65 S.Ct. 1189, 89 L.Ed. 2005 (1945); *Malinski v. People of New York State*, 324 U.S. 401, 65 S.Ct. 781, 89 L.Ed. 1029 (1945).

With respect to the evidence in this action, adduced before an

Administrative Law Judge of the New York Unemployment Insurance Appeal Board, the New York Court of Appeals found that "substantial" evidence existed in the record to support the findings of the Unemployment Insurance Appeal Board. (Appendix B).

The manner in which the "substantial evidence test" was disregarded by the New York Court of Appeals in reversing the Appellate Division, Third Department, clearly violated due process and equal protection guarantees of the 14th Amendment because it failed to account for the evidence contained in the record below as a whole.

Similarly, at the hearing before the Administrative Law Judge, the claimant did not appeal. A "Summary of Interview", dated April 17, 1984, given by claimant, was marked in evidence. This Summary constituted the Commissioner's case.

At the conclusion of the hearing, State Line's counsel moved to dismiss the proceeding upon the ground that his right to cross-examine claimant was foreclosed by receipt of the Summary in evidence.

Clearly, administrative proceedings, including proceedings concerning unemployment insurance, must afford parties thereto the basic right of cross-examination. Regardless of the merits in a particular case, a party whose rights are being determined at a quasi-judicial administrative hearing must be given the opportunity to cross examine witnesses. Similarly, while hearsay evidence is admissable in an administrative hearing, a determination must be supported by some substantial evidence which is acceptable in a court of law and which approaches a minimum standard of fairness.

Receipt of the Summary Interview did not permit cross-examination. Deprivation of this right was a constitutional infirmity fatal to the Commissioner's and the claimant's case, and further demonstrates the arbitrary and capricious character of the Court of

Appeals' reliance on the decision below.

Finally, the New York Court of Appeals failed to address, in any way, its complete disregard for New York statutes and the wide departure from precedent taken by Unemployment Insurance Appeal Board. Such failure by the New York Court fails to afford State Line equal protection of the laws in violation of the Fourteenth Amendment.

First, the Court overlooked the fact that under no circumstances could Juan Rivera *ever* be entitled to unemployment benefits, by reason of the voluntary termination of his association with State Line for the purposes of returning to school (Hearing Transcript p. 17, 104/84) (Labor Law §593(1)). So much was argued to the Court below and reference to this fact was made in the papers submitted to the Court of Appeals.

Second, the Court overlooked the fact that the holding of the Unemployment Insurance Appeal Board [which was reversed by the Appellate Division and reinstated by this Court] was squarely in conflict with its own decisions and decisions of this Court based upon factually identical situations. *Matter of New York and New Jersey Freightways, Inc. (Ross)*, 55 A.D.2d 989, 391 N.Y.S.2d 197 (3rd Dep't 1977); *Matter of Want Ad Digest, Inc. (Roberts)*, 105 A.D.2d 895, 482 N.Y.S.2d 360 (3rd Dep't 1984).

Because of the inconsistency of the Board's determination, and its clear and obvious repugnance to its own prior determinations in similar matters, without explanation, the law requires a determination that the actions of the Board in this case—and that the decision below which was based upon those proceedings—were "arbitrary and capricious." *Matter of Charles A. Field Delivery Service (Roberts)*, 66 N.Y.2d 516, 498 N.Y.S.2d 111, 488 N.E.2d 1223 (1985).

The failure of the Court of Appeals to address the foregoing

matters in any way deprives State Line of its constitutional right of equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution.

CONCLUSION

The New York Court of Appeals' decision below raises significant constitutional issues which the Court should address.

Accordingly, the writ should be granted.

Dated: New York, New York
March 16, 1987

Respectfully submitted,

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On the Writ:

James C. McMahon, Jr.
Bret L. Mercuris

APPENDIX A—DECISION, NEW YORK STATE DEPARTMENT OF LABOR, BY JOHN E. REILLY, ADMINISTRATIVE LAW JUDGE, DATED OCTOBER 11, 1984

New York State Department of Labor
Administrative Law Judge Section

DECISION

Name

JUAN F. RIVERA (LEAD CASE)

SSA #	ALJ #	L.O. #
060-46-9883	34-19079	512

STATE LINE DELIVERY SERVICE, INC.

SSA #	ALJ #	L.O. #
14-30530	84-19080	E

Decision mailed and duly filed in the Departmen of Labor on Jan. 24, 1985.

FINDING OF FACTS: Hearings were held at which a representative of the employer, the attorney for the employer and a representative of the Commissioner of Labor appeared. Testimony was taken.

Claimant Juan F. Rivera filed an original claim effective December 12, 1983 thereby establishing a base period from December 13, 1982 through December 11, 1983. By initial determination claimant was ruled eligible for unemployment insurance benefits at a benefit rate of $148.00. The objecting party State Line Delivery objects to this determination on the grounds that claimant and all other similarly

situated are independent contractors and not employees.

Claimant J.F.R. was associated with the objecting party from November 1982 through October 1983 at which time his association with this organization came to an end. Claimant's association with the objecting employer commenced when J.F.R. answered a newspaper advertisement for a person to make deliveries for a delivery service. The person that was to make deliveries had to own his own vehicle. J.F.R. was interviewed by the company and added to its staff of owner-operators. These persons made pick ups and delivered letters and small packages. These persons were to call the establishment whenever they were ready to work. If the company had an assignment available for them it was given them. If the company did not have an assignment for these persons they did no work. There was no requirement that these owner-operators contact the establishment on any fixed schedule. The owner-operator provided his own motor vehicle, paid his own tolls, paid for his own gas, paid for his own automobile repairs and his own automobile insurance. If he wished to engage the services of a helper this helper would be paid by the owner-operator.

The owner operator was paid on a sliding commission scale starting at 50% and ending at 60%. Each owner-operator negotiated his own individual commission with the objecting party. The objecting party supplied no logo for the owner-operator's vehicle and supplied no identification (such as identity cards) showing that the owner-operator was associated with the objecting party. The company did supply Bills of Lading which were used to show pick up and delivery the delivery. The owner-operator returned these signal receipts to the company approximately once a week. The owner operator had to keep his own records if he wished to be sure he was being reimbursed correctly by the company. There was no requirement that the owner operator keep a work log. The owner-operator was also required to carry cargo insurance. The company offered the owner operator cargo

insurance at special discounts if it was purchased through the company. The objecting party deducted the amount owed for cargo insurance from the payments that were due the owner-operator. The owner operator mapped out his own routes. The owner-operator was also allowed to work for other organizations at the same time that he were associated with the objecting party.

The company had other people who performed similar tasks. These persons were actual employees. However the employer set up a schedule for them on a daily basis, they had to report daily to the premises to pick up their schedule and work, and they had to keep a log and file reports and follow established routes. When they finished an assignment they had to report in to the dispatcher. They told the customers that they were employees of the objecting party. The company supplied motor vehicles to these persons and paid all expenses connected with said motor vehicles.

OPINION: I find that based upon the evidence before me that claimant J.F.R. was an independent contractor and not an employee. There was no employer-employee relationship established here. The evidence shows that J.F.R. was an independent contractor. He was his own boss and he did not have to perform any services for the objecting party unless he wished to do so. It is to be noted that the objecting party in so far as J.F.R. and all other owner-operators similarly situated are concerned did not establish sufficient control over their operations so as to show them to be employees within the meaning of the Law. It is to be further noted that these owner-operators could work for competitors of the objecting employer at the same time that they worked for the objecting employer. They could work one day for the objecting employer and not contact the objecting employer for long periods of time or ever again if they so desired. I therefore find that under these circumstances that claimant J.F.R. was an independent contractor and not an employee.

DECISION: The initial determination of eligibility is overruled. Claimant and all other similarly situated are independent contractors and not employees of the objecting employer. Claimant therefore is not eligible to file a valid original claim based upon his association with the objecting party.

/s/ JOHN E. REILLY
ADMINISTRATIVE LAW JUDGE

ob
10/11/84

APPENDIX B—DECISION, NEW YORK STATE DEPARTMENT OF LABOR UNEMPLOYMENT INSURANCE APPEAL BOARD, FILED AUGUST 21, 1985

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE APPEAL BOARD

RE: NAME
JUAN F. RIVERA

S.S. NO.	E.R. NO.	CASE NO.	A.B. NO.
060-46-9883		84-19079	362,000

STATE LINE DELIVERY SERVICE, INC.

S.S. NO.	E.R. NO.	CASE NO.	A.B. NO.
	14-30530	84-19080	362,001

Decision mailed and duly filed in the Department of Labor on Aug. 21, 1985.

PRESENT: G. DOUGLAS PUGH, JOHN F. LENNON, MEMBERS

The Commissioner of Labor appeals from the decision of the administrative law judge filed January 24, 1985, overruling the determination of the Commissioner of Labor holding the employer liable for contributions an remuneration paid to the claimant and all other persons who performed services under similar circumstances; and sustaining the employer's objection to the payment of benefits to claimant, that claimant is an indpendent contractor.

Hearings were held before the administrative law judge at which all parties were accorded a full opportunity to be heard and at which a representative of the employer, the attorney for the employer, and a

representative of the Commissioner of Labor appeared and testimony was taken. The board considered the arguments contained in the written statement submitted on behalf of the Commissioner of Labor and of the employer on appeal.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The employer is in the business of providing pick-ups and delivery service of letters and small packages in an area composing of the five boroughs of New York City, Westchester County and parts of New Jersey. The employer employs four persons to carry out delivery services on a scheduled, full-time basis, and they are paid on an hourly basis. They drive vans and cars owned by the employer, and the employer pays all the expenses connected with the vehicles. The employer acknowledges that these individuals are employees. The employer-corporation also engages the services of approximately fifteen deliverypersons, who perform delivery services using their own vehicles and who pay all the expenses incurred in operating their vehicles. The employer considers these deliverypersons independent contractors. The claimant was engaged as such a deliveryperson. The employer obtained the services of the deliverypersons by referral and by advertising in the newspaper. When the employer engages a deliveryperson, the individual is interviewed by the employer and the nature of the employer's operation is explained to the deliveryperson. The deliverypersons call the employer's dispatcher to obtain assignments. They are then told where to go for pick-ups and where to make the deliveries. In approximately eighty percent of the assignments, the deliveryperson must complete the delivery by the deadline set by the employer's customer. The employer supplies the deliverypersons with bills of lading in quadruplicate and on which the employer's letterhead is printed. One of these forms is left with the business where the pick-up is made, as a receipt. The recipient of the delivery signs the form

and is given one copy. The delivery person returns two copies of the bill of lading to the employer. The employer pays the deliverypersons weekly, using the bills of lading to determine the amount of work that they have done. The employer pays the deliverypersons on a Commission basis, which the employer determines for each individual on a sliding scale between fifty percent and sixty percent. The employer bills the customers, and a deliveryperson receives a commission regardless of whether or not a customer pays the employer. The employer requires the deliverypersons to carry cargo insurance, and offers them the insurance under the employer's policy. The cost of the insurance is deducted from the deliveryperson's weekly pay. The employer also rents "beepers" to some of the deliverypersons at a rate of $5 per week. By means of the "beeper", the employer is then able to notify a deliveryperson that an assignment is available. While working for the employer, the deliverypersons were allowed to accept assignments from other companies that provide delivery service.

The claimant filed an original claim for benefits effective December 12, 1983, thereby establishing a base period from December 13, 1982 through December 11, 1983. He was credited with 37 weeks of employment and remuneration of $10,963 with this employer. Claimant's benefit rate was established at $148.

OPINION: The credible evidence establishes that the employer exercised sufficient supervision, direction and control over the services rendered by the deliverypersons, or retained the right to exercise such supervision, direction and control, so as to establish an employer-employee relationship under the Unemployment Insurance Law. The deliverypersons were told when and where to make pickups and deliveries, and were often given deadlines for the completion of an assignment. The employer set the rate of commission for the deliverypersons and billed the customers. If a customer failed to pay the delivery charges, the employer still paid the

deliverypersons. The fact that the deliverypersons provided their own vehicles is similar to workmen providing their own tools and does not necessarily signify an independent contractor status. Furthermore, the fact that a deliveryperson had no regular schedule does not make that person any less of an employee. The employer's operation required, in addition to a certain number of full-time deliverypersons, a sufficient number of part-time deliverypersons to serve the fluctuating needs of its customers. The services rendered by the claimant and the other deliverypersons were an integral part of the business without which the employer could not operate. Under the circumstances herein, we conclude that the claimant and all other deliverypersons were employees of the employer herein and not independent contractors, and the claimant should be credited with his weeks of employment and remuneration with the employer during his base period.

DECISION: The determination of the Commissioner of Labor is sustained.

The objection of the employer is overruled.

The decision of the administrative law judge is reversed.

G. DOUGLAS PUGH, MEMBER
JOHN F. LENNON, MEMBER

RY:JK

APPENDIX C—DECISION, SUPREME COURT, STATE OF NEW YORK, APPELLATE DIVISION THIRD JUDICIAL DEPARTMENT, DATED MAY 15, 1986

120 A.D. 2d 852

In the Matter of the Claim of Juan F. RIVERA, Respondent,

State Line Delivery Service, Inc., Appellant.

Lillian Roberts, as Commissioner of Labor, Respondent.

Supreme Court, Appellate Division, Third Department.

May 15, 1986.

Brodsky, Linett, Altman & McMahon (James C. McMahon, Jr., of counsel), New York City, for appellant.

John D. Chestara, Troy, for Juan F. Rivera, respondent.

Before KANE, J.P., and MAIN, MIKOLL, HARVEY and YESAWICH, JJ.

HARVEY, Justice.

Appeal from a decision of the Unemployment Insurance Appeal Board, filed August 21, 1985, which, *inter alia*, ruled that claimant was entitled to receive benefits.

State Line Delivery Service, Inc. (State Line) maintains a messenger service business, picking up and delivering letters and small packages in and around New York City. In order to carry out delivery services, State Line has four full-time employees. These employees are paid on an hourly basis and provided with vehicles which are fully maintained by State Line. Additionally, State Line uses the services of approximately 15 owner-operators who it contends are independent contractors. Claimant was such an owner-operator for State Line from November 1982 to October 1983. The Unemployment Insurance Appeal Board, reversing the Administrative Law Judge, awarded benefits to claimant after finding that claimant was an employee and not an independent contractor This appeal by State Line ensued.

[1,2] On this appeal, State Line contends that the Board's finding that claimant was its employee rather than an independent contractor is not supported by substantial evidence on the record. We agree. Although no single factor is dispositive in determining whether an employer-employee relationship exists, the control exercised over a claimant is a significant factor (*Matter of Want Ad Digest [Roberts]*, 105 A.D.2d 895, 482 N.Y.S.2d 360; *Matter of Ted Is Back Corp. [Roberts]*, 103 A.D.2d 932, 478 N.Y.S.2d 178, *affd.* 64 N.Y.2d 725, 485 N.Y.S.2d 742, 475 N.E.2d 113).

The relationship between the two parties resulted from claimant's answering State Line's newspaper advertisement which stated, "Owner operator needed to work on commission for high volume messenger service 914-939-6500." Claimant agreed to furnish his own vehicle and pay all the expenses of gasoline, tolls, oil, maintenance and insurance. In addition to the ordinary insurance involving motor vehicles, claimant was required by State Line to carry cargo insurance at his own expense. For his services, he was given a percentage of the commissions charged State Line's customers. Claimant committed himself to no particular amount of services. When he wished to make himself available, he telephoned State Line's

dispatcher and accepted such work as he desired from that made available by the dispatcher. He was free to choose any route to perform the services. He was not prohibited from soliciting assignments from other companies similarly situated and he was not prohibited from carrying on his business with one or more additional companies while providing services for State Line. Owner-operators were free to hire helpers without notification to the company and claimant availed himself of that opportunity. He was given no fringe benefits of any nature by State Line, and no income or social security taxes were withheld from claimant's compensation. State Line had never been sued as a defendant in an automobile accident in which a vehicle of an owner-operator was involved and no claim for workers' compensation had ever been made by an owner-operator.

Once a work assignment was accepted by an owner-operator, he was subjected to only one control and that was a time limitation for delivery established, not by State Line, but by the customer involved. In that respect the control was similar to that which we observed in *Matter of Paragon Process Serv. (Roberts)*, 103 A.D.2d 882, 477 N.Y.S.2d 1009, where the attorneys engaging the services of the process service organization established the various requirements for service. We conclude that the facts in the record fail to establish such control over claimant as to constitute an employer-employee relationship (*see, Matter of 12 Cornelia St. [Ross]*, 56 N.Y.2d 895, 453 N.Y.S.2d 402, 438 N.E.2d 1117; *Matter of Paragon Process Serv. [Roberts], supra*, 103 A.D.2d p. 882, 477 N.Y.S.2d 1009).

Decision reversed, without costs, employer's objection to claimant's eligibility for benefits is sustained, and matter remitted to the Unemployment Insurance Appeal Board for further proceedings not inconsistent herewith.

MAIN and MIKOLL, JJ., concur.

KANE, J.P., and YESAWICH, J., dissent and vote to affirm in a memorandum by YESAWICH, J.

We respectfully dissent and vote to affirm. The evidence recited by the majority undeniably points to the conclusion that claimant was an independent contractor, but the record also contains other evidence which we believe justifies the contrary determination reached by the Board. The following factors bear favorably on the Board's decision: first, the employer, at its pleasure, daily dispensed delivery assignments—most of which had time deadlines for completion (*see, Matter of DiMartino [Ross]*, 59 N.Y.2d 638, 463 N.Y.S.2d 189, 449 N.E.2d 1267); second, workers like claimant were responsible for completing bills of lading displaying, not theirs, but the employer's letterhead; third, the employer alone solicited and billed customers; fourth, and perhaps most important, the employer fixed the commission rate of its workers and paid them whether or not the customer ultimately paid it for the services rendered (*see, Matter of Rinaldi [Corsi]*, 281 A.D. 1051, 121 N.Y.S.2d 155, *lv. denied* 306 N.Y. 982). And it is of some significance, as the Board recognized, that employment of delivery persons was integral to the daily operations of the employer's business; in fact, they sometimes outnumbered the employer's regular employees by a three-to-one margin. If claimant was indeed a truly independent contractor, he would have had real control over the work or service that State Line agreed to furnish its customers, as well as the price of his labor, and State Line would not have unilaterally dominated each of the critical elements of their business relationship.

APPENDIX D—ORDER, SUPREME COURT, STATE OF NEW YORK, APPELLATE DIVISION THIRD JUDICIAL DEPARTMENT, ENTERED JUNE 2, 1986

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 10th day of March, 1986.

PRESENT:

HON. T. PAUL KANE,
Justice Presiding,

HON. ROBERT G. MAIN,
HON. ANN. T. MIKOLL,
HON. PAUL J. YESAWICH, JR.,
HON. NORMAN L. HARVEY,
Associate Justices.

In the Matter of the Claim of
JUAN F. RIVERA,
Respondent,
STATE LINE DELIVERY SERVICE, INC.,
Appellant,
LILLIAN ROBERTS, as Commissioner of Labor,
Respondent.

App. Div. Docket #51415

STATE LINE DELIVERY SERVICE, INC., having appealed from a decision of the Unemployment Insurance Appeal Board, filed on the 21st day of August, 1985, and said appeal having been presented during the above-stated term of this Court, and having been argued by James C. McMahon, Jr., Esq., of counsel for appellant, and by John D. Chestara, Esq., of counsel for respondent, and, no brief having been submitted on behalf of the Commissioner of Labor, and, after due deliberation, the Court having rendered a decision on the 15th day of May, 1986, (Justices Kane and Yesawich, Jr. dissenting), it is hereby

ORDERED that the decision so appealed from be and the same hereby is reversed without costs, the objection of the employer, State Line Delivery Service, Inc., to the eligibility for benefits of claimant, Juan F. Rivera, is sustained and this matter remitted to the Unemployment Insurance Appeal Board for further proceedings not inconsistent with the decision of this Court.

ENTER:

/s/ Michael J. Novack
Clerk

DATED AND ENTERED: June 2, 1986

APPENDIX E—MEMORANDUM ORDER, STATE OF NEW YORK COURT OF APPEALS, DATED DECEMBER 18, 1986

STATE OF NEW YORK
COURT OF APPEALS

MEMORANDUM

3 No. 484
In the Matter of Juan F. Rivera,
Respondent,

State Line Delivery Service, Inc.,
Respondent,

Lillian Roberts, as Commissioner of Labor,
Appellant.

3 No. 485
In the Matter of James P. Ross, et. al.,
Respondents,

Majestic Messenger Service, Inc.,
Appellant,

Lillian Roberts, as Commissioner of Labor,
Respondent.

3 No. 486
In the Matter of Joan M. Fox,
Appellant-Respondent,

James Whalen, d/b/a Whalen's Service,
Respondent,

Lillian Roberts, as Commissioner of Labor,
Respondent-Appellant.

(SSM 128) Robert Abrams, Attorney General (Richard S. LoPirmo of counsel) for the appellant.
Alvin Altman, NYC, for respondent Service.
John D. Chestara, Troy, for respondent Rivera.

(SSM 130) Evan J. Spelfogel, NYC, for appellant.
Donald W. Boyajian, Albany, for respondent Ross.
Robert Abrams, Attorney General (Rochelle M. Baron of counsel) for respondent Roberts.

(SSM140) David J. Wukitsch, Albany, for appellant.
Daniel P. Forsyth, Buffalo, for respondent Whalen.
Robert Abrams, Attorney General (Iris A. Steel of counsel) for respondent Roberts.

MEMORANDUM

The orders of the Appellate Division in *Rivera* and *Fox* should be reversed, with costs, and the decisions of the Unemployment Insurance Appeals Board reinstated and the order of the Appellate Division in *Ross* should be affirmed, with costs.

In each of these cases whether the relationships of the operators-deliverers with the delivery companies is that of employees or independent contractors involves a question of fact as to whether there is evidence of either control over the results produced or over the means used to achieve the results (*Matter of Field Delivery Service [Roberts]*, 66 NY2d 516, 521; *Matter of Ted is Back Corp. [Roberts]*, 64 NY2d 724, 725; *Matter of 12 Cornelia Street [Ross]*, 56 NY2d 895, 897; *Matter of Sullivan [Miller]*, 289 NY 110, 112). The agency's determination of this question of fact, if supported by substantial evidence on the record as a whole, is beyond further judicial review even though there is evidence in the record to support a contrary conclusion (*Matter of Field Delivery Service, supra; Matter of Concourse Ophthalmology Assoc. [Roberts]*, 60 NY2d 734, 736; *Matter of Morton [Miller]*, 284 NY 167; *Matter of Stork Restaurant v. Boland*, 282 NY 256.) The determination in each case by the Unemployment Insurance Appeal Board that the relationship was that of employer-employee is amply supported by proof in the record. There being substantial evidence to sustain the determinations, the judicial inquiry is complete (*Matter of Field Delivery Service, supra; Matter of Villa Maria Institute of Music [Ross]*, 54 NY2d 691, 692). Moreover, the agency determinations in these three cases are consistent with prior cases with substantially similar facts (*Matter of Field Delivery Service, supra* at 520; *see, Matter of DiMartino [Buffalo Courier Express Co. - Ross]*, 89 AD2d *affd* 59 NY2d 638; *Matter of Wells [Utica Observer-Dispatch & Utica Daily Press [Roberts]*, 87 AD2d 960 *affd* 59 NY2d 638).

We have considered the other arguments raised by the parties and find them to be without merit.

Case #484 - *Mtr. of Rivera*

On review of submissions pursuant to section 500.4 of the Rules, order reversed, with costs, and decision of the Unemployment Insurance Appeal Board reinstated in a memorandum. Chief Judge Wachtler and Judges Meyer, Simons, Kaye, Alexander, Titone and Hancock concur.

Case #485 - *Mtr. of Ross*

On review of submissions pursuant to section 500.4 of the Rules, order affirmed, with costs, in a memorandum. Chief Judge Wachtler and Judges Meyer, Simons, Kaye, Alexander, Titone and Hancock concur.

Case #486 - *Mtr. of Fox*

On review of submissions pursuant to Section 500.4 of the Rules, order reversed, with costs, and decision of the Unemployment Insurance Appeal Board reinstated in a memorandum. Chief Judge Wachtler and Judges Meyer, Simons, Kaye, Alexdander, Titone and Hancock concur.

Decided December 18, 1986

APPENDIX F—ORDER, SUPREME COURT, STATE OF NEW YORK, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, ENTERED FEBRUARY 2, 1987

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 5th day of January, 1987.

PRESENT: HON. T. PAUL KANE,
Justice Presiding;
HON. ROBERT G. MAIN,
HON. ANN T. MIKOLL,
HON. PAUL J. YESAWICH, JR.,
HON. NORMAN L. HARVEY,
Associate Justice.

In the Matter of the Claim of
JUAN F. RIVERA,

Respondent,

STATE LINE DELIVERY SERVICE, INC.,

Appellant,

App. Div.
Docket
#51415

LILLIAN ROBERTS, as Commissioner
of Labor,

Respondent.

The above-named appellant having appealed to the Court of Appeals from an order of the Appelate Division of the Supreme Court, Third Judicial Department, entered in the office of the clerk on June 2, 1986, which reversed a decision of the Unemployment Insurance Appeal Board filed August 21, 1985, and said appeal having been presented in the Court of Appeals by Honorable Robert Abrams, Attorney General of the State of New York, counsel for appellant, Commissioner of Labor, and by Brodsky, Linett, Altman and McMahon, Esqs., counsel for respondent, State Line Delivery Service, Inc., and by John D. Chestara, Esq., counsel for respondent, Juan F. Rivera, and, after due deliberation, the Court of Appeals, on review of the submissions pursuant to section 500.4 of its rules, having reversed the order of the Appellate Division, with costs, and having reinstated the decision of the Unemployment Insurance Appeal Board, and having ordered that the record and proceedings in that court be remitted to this court to be proceeded upon according to law, and the remittitur of the Court of Appeals having been filed in this court, it is hereby

ORDERED that the order of the Court of Appeals be, and the same hereby is, made the order of this court; and it is further

ORDERED that the order of the Appellate Division be, and the same hereby is, reversed, with costs; and it is further

ORDERED that the decision of the Unemployment Insurance Appeal Board be reinstated.

ENTER:

/s/ Michael J. Novack,
Clerk

DATED AND ENTERED: February 2, 1987

APPENDIX G—ORDER, STATE OF NEW YORK, COURT OF APPEALS, DATED FEBRUARY 19, 1987

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the nineteenth day of February A.D. 1987.

PRESENT, HON. SOL WACHTLER, Chief Judge, Presiding.

Mo. No. 100

In the Matter of Juan F. Rivera,
Respondent,

State Line Delivery Service, Inc.,
Respondent,

Lillian Roberts, as Commissioner of Labor,
Appellant.

A motion for reargument to the Court of Appeals in the above cause having been heretofore made upon the part of the respondent State Line Delivery Service, Inc. herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is dismissed as untimely.

/s/ Donald M. Sheraw
Clerk of the Court

APPENDIX H—NEW YORK STATE LABOR LAW, §593 1(a)(b 1 & 2)

§593. Disqualification for benefits

1. Voluntary separation.

(a) No days of total unemployment shall be deemed to occur after a claimant's voluntary separation without cause from his last employment prior to the filing of his claim until he has subsequently worked in employment on not less than three days in each of five weeks and earned remuneration at least equal to five times his weekly benefit rate. In addition to other circumstances that may be found to constitute good cause, voluntary separation from employment shall not in itself disqualify a claimant if circumstances have developed in the course of such employment that would have justified the claimant in refusing such employment in the first instance under the terms of subdivision two of this section or if the claimant, pursuant to an option provided under a collective bargaining agreement or written employer plan which permits waiver of his right to retain the employment when there is a temporary layoff because of lack of work, has elected to be separated for a temporary period and the employer has consented thereto.

(b) A disqualification as provided in this subdivision shall also apply after a claimant's voluntary separation from his last employment prior to the filing of his claim if such voluntary separation was due to claimant's

(1) marriage, or

(2) following his spouse to another locality.

APPENDIX I—UNITED STATES CONSTITUTION AMENDMENT XIV, SECTION 1

AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.